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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCUS JAMES TATUM,

Defendant.

Case No: 1:20-cr-00255-DAD-BAM

**STIPULATION TO CONTINUE APRIL 27, 2022,
STATUS CONFERENCE TO JULY 13, 2022;
AND ORDER**

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Hon. Barbara A. McAuliffe

This case is set for a status conference on April 27, 2022. Dkt. 22. On May 13, 2020, this Court issued General Order 618, which suspended all jury trials in the Eastern District of California “until further notice.” Under General Order 618, a judge “may exercise his or her authority to continue matters, excluding time under the Speedy Trial Act with reference to the court’s prior General Order 611 issued on March 17, 2020 . . . with additional findings to support the exclusion in the Judge’s discretion.” General Order 618, ¶ 6 (E.D. Cal. May 13, 2020). In addition, any judge “may order case-by-case exceptions” to General Order 618’s provisions “at the discretion of that Judge or upon the

1 request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order
2 will impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020). This and
3 previous General Orders were entered to address public health concerns related to COVID-19.

4 Although the General Orders address the district-wide health concern, the Supreme Court has
5 emphasized that the Speedy Trial Act’s end-of-justice provision “counteract[s] substantive
6 openendedness with procedural strictness,” “demand[ing] on-the-record findings” in a particular case.
7 *Zedner v. United States*, 547 U.S. 489, 509 (2006). “[W]ithout on-the-record findings, there can be no
8 exclusion under” § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at
9 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
10 judge ordering an ends-of-justice continuance must set forth explicit findings on the record “either orally
11 or in writing”).

12 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
13 and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-
14 justice continuances are excludable only if “the judge granted such continuance on the basis of his
15 findings that the ends of justice served by taking such action outweigh the best interest of the public and
16 the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable
17 unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that
18 the ends of justice served by the granting of such continuance outweigh the best interests of the public
19 and the defendant in a speedy trial.” *Id.*

20 The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code
21 T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics,
22 natural disasters, or other emergencies, this Court has discretion to order a continuance in such
23 circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance
24 following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court
25 recognized that the eruption created “appreciable difficulty” for the trial to proceed. *Id.* at 767-69; *see*
26 *also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time
27 following the September 11, 2001 terrorist attacks and the resultant public emergency).

1 The coronavirus is posing a similar, albeit much more enduring, “appreciable difficulty” to the
 2 prompt proceedings mandated by the statutory rules. Recently, the Ninth Circuit enumerated a “non-
 3 exhaustive” list of seven factors it found to be “relevant” in considering ends-of-justice Speedy Trial Act
 4 continuances “in the context of the COVID-19 pandemic.” *United States v. Olsen*, --- F.3d ---, 2021 WL
 5 1589359 at *7 (9th Cir. Apr. 23, 2021). That non-exhaustive list includes: (1) whether a defendant is
 6 detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked
 7 speedy trial rights since the case’s inception; (4) whether a defendant, if detained, belongs to a
 8 population that is particularly susceptible to complications if infected with the virus; (5) the seriousness
 9 of the charges defendant faces, and in particular whether the defendant is accused of violent crimes; (6)
 10 whether there is a reasons to suspect recidivism if the charges against the defendant are dismissed; and
 11 (7) whether the district court has the ability to safely conduct a trial. *Id.*

12 In light of the foregoing, this Court should consider the following case-specific facts in finding
 13 excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7)
 14 (Local Code T4). If continued, this Court should designate a new date for this matter’s next status
 15 conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial
 16 continuance must be “specifically limited in time”).

18 STIPULATION

19 THE PARTIES HEREBY STIPULATE, through their respective attorneys of record, Assistant
 20 United States Attorney Brian W. Enos, counsel for the government, and Monica L. Bermudez, counsel
 21 for defendant Marcus James Tatum (“defendant”), that this action’s **Wednesday, April 27, 2022 status**
 22 **conference be continued to Wednesday, July 13, 2022, at 1:00 p.m.** The parties likewise ask the
 23 court to endorse this stipulation by way of formal order.

24
 25 The parties base this stipulation on good cause. Specifically,

- 26 1. Defendant was arraigned on May 28, 2021. Dkt. 4. On this same date, the parties also filed a
- 27 stipulation and proposed protective order regarding the production of unredacted discovery

- 1 that includes confidential information about third parties. Dkt. 3. On May 28, 2021, the
2 court endorsed this stipulation by way of formal order. Dkt 7. Defense counsel regarding
3 this matter was appointed to represent defendant on June 4, 2021. Dkt. 9.
- 4 2. Pursuant to the aforementioned protective order, the government produced discovery to the
5 defense on June 7, 2021, which includes not just paper discovery but also voluminous data
6 contained in certain electronic devices. Although the defense continues its review of this
7 discovery, the parties nevertheless agreed that it would be prudent for the government to
8 draft and present a plea offer to the defense for its review. Counsel for the government
9 delivered a draft plea agreement to the defense earlier this week.
- 10 3. At or near the completion of the defense's review of discovery, it may seek to analyze
11 electronic evidence relevant to defendant's charges pursuant to Section 3509(m) of the Adam
12 Walsh Act. This evidence is located at the FBI's Bakersfield Office. Counsel for the
13 government will assist with any necessary logistics attendant to this review upon the
14 defense's request.
- 15 4. Counsel for the defense is awaiting a verdict following a multi-week trial regarding a matter
16 docketed in state court. Depending on the jury's verdict, a second phase of trial may
17 commence soon thereafter. After the second phase of this trial concludes, the defense will be
18 able to review the plea offer and conduct additional investigation and analysis of discovery
19 relating to the same. The parties estimate that a continuance of the April 27, 2022 status
20 conference is necessary in order to complete these analyses and engage in meaningful future
21 negotiations regarding a potential resolution to this case in advance of trial. During this time
22 counsel for the government will likewise search for potential supplemental discovery to
23 produce.
- 24 5. The parties anticipate that they will be prepared to set a trial date, or alternatively a change of
25 plea date, by the continued status conference on July 13, 2022.
- 26 6. The parties therefore stipulate that the period of time from April 27, 2022, through July 13,
27 2022, is deemed excludable pursuant to 18 U.S.C. §§ 3161(h)(7)(A) and 3161(h)(7)(B)(i) and
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(iv) because it results from a continuance granted by the Court at the parties' request on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

IT IS SO STIPULATED.

Dated: April 14, 2022

PHILLIP A. TALBERT
United States Attorney

By: /s/ Brian W. Enos
Brian W. Enos
Assistant United States Attorney

(As authorized 4/15/22)

Dated: April 15, 2022

By: /s/ Monica L. Bermudez
Monica L. Bermudez, Esq.
Attorney for Defendant
Marcus James Tatum

ORDER

IT IS ORDERED that the status hearing currently set for April 27, 2022, at 1:00 pm is continued until **July 13, 2022, at 1:00 p.m. before Magistrate Judge Barbara A. McAuliffe.**

IT IS FURTHER ORDERED THAT the period of time from April 27, 2022, through July 13, 2022, is deemed excludable pursuant to 18 U.S.C. §§ 3161(h)(7)(A) and 3161(h)(7)(B)(i) and (iv) because it results from a continuance granted by the Court at defendants' request on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

IT IS SO ORDERED.

Dated: April 18, 2022

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE